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Sunstar Americas, Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

San Francisco Technology, Inc.

Plaintiff,

vs.

The Glad Products Company, Bajer Design &
Marketing Inc., Bayer Corporation, Bright
Image Corporation, Church & Dwight Co. Inc.,
Colgate-Palmolive Company, Combe
Incorporated, The Dial Corporation, Exergen
Corporation, GlaxoSmithKline LLC, Hi-Tech
Pharmaceutical Co. Inc., Johnson Products
Company Inc., Maybelline LLC, McNeil-PPC
Inc., Medtech Products Inc., Playtex Products
Inc., Reckitt Benckiser Inc., Roche Diagnostics
Corporation, SoftSheen-Carson LLC, Sun
Products Corporation, Sunstar Americas Inc.

Defendants.

Case No: CV10-00966 JF PVT

Assigned for all purposes to the
Honorable Jeremy Fogel
Courtroom 3

**REPLY MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF
JOINDER BY DEFENDANT SUNSTAR
AMERICAS, INC. TO MOTIONS**

Date: July 8, 2010
Time: 1:30 p.m.
Courtroom: 3

Complaint filed: 03/05/2010
Trial date: None set

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1 Specially appearing defendant Sunstar Americas, Inc. ("Sunstar"), submits the
 2 following bullet point reply memorandum of points and authorities in support of defendants'
 3 motions to sever, transfer, dismiss and stay.

4
 5 **MEMORANDUM OF POINTS AND AUTHORITIES**

6
 7 **I.**

8 **ARGUMENT**

9 For the purposes of joining co-defendants motions to dismiss, sever, transfer and/or
 10 stay, the following responds principally to plaintiff's opposition to the motion to sever and
 11 transfer. However, Sunstar joins in the replies filed by co-defendants for the purposes of
 12 supplementing this reply brief, including for the purposes of the motion to dismiss and stay.

- 13
- 14 • The argument that there are no contracts or forum selection clauses at
 15 issue (Opposition, p. 2:7-10) *does not* weigh in favor of maintaining venue
 16 with the Northern District of California. In fact, cross-claims may be
 17 appropriate and, since Sunstar's only suppliers are in Illinois (McMahon
 18 Decl., ¶ 13), those contracts were entered into and performed *in Illinois*,
 19 not California.
 - 20
 - 21 • The argument that California law is at issue and a California *based* court is
 22 better suited to address the issues (Opposition, p. 2:11-22) does not make
 23 sense, since the complaint is pled on *federal question jurisdiction*.
 24 Moreover, the complaint does plead a California statutory claim or pray
 25 for any relief upon a California statute. Finally, the statutory section
 26 plaintiff relies upon is *non-substantive* and relates to a potential
 27 discretionary award for fees and costs to the prevailing party.
 28

- 1 • The argument that deference should be granted to plaintiff's chosen forum

2 (Opposition, pp. 2:24-3:21) should be heavily discounted, because, among

3 other reasons, the only connection with the Northern District of California

4 is the location of plaintiff's counsel. According to plaintiff San Francisco

5 Tech., Inc.'s ("S.F. Tech") Disclosure of Non-Party Interested Entities or

6 Persons (Doc. No. 24), the only person with any financial interest in S.F.

7 Tech is Daniel S. Mount, named partner of Mount & Stoelker, P.C.,

8 plaintiff's counsel of record. (See

9 [http://www.mount.com/index.cfm?page=attorney&pageid=85&bio=7&lan](http://www.mount.com/index.cfm?page=attorney&pageid=85&bio=7&languageid_select=)

10 [guageid_select=](http://www.mount.com/index.cfm?page=attorney&pageid=85&bio=7&languageid_select=).) And, the location of plaintiff's counsel is of no

11 significance to the venue determination. (*Zimpelman v. Progressive*

12 *Northern Ins. Co.*, 2010 WL 135325, 1 (N.D. Cal. Jan 8, 2010.)

13 ("[C]ourts generally do not consider the convenience of counsel to be a

14 relevant factor in considering a motion to transfer venue.".) Plus,

15 plaintiff's reliance upon *Forst Group v. Bon Tool*, 590 F.3d 1295 (Fed.

16 Cir. 2009), is misplaced, since it resolved nothing regarding a motion to

17 transfer venue. Finally, a transfer does not discourage the claim, since

18 nothing precludes similar such plaintiffs in Illinois from pursuing the

19 alleged *qui tam* action.

20

21 • Plaintiff's argument of "significant contact" with the Northern District of

22 California (Opposition pp. 3:24-4:9) is *inaccurate and misleading*. First,

23 plaintiff misstates Sunstar's supporting evidence. Plaintiff's opposition

24 misleadingly states that Sunstar "sells 13 percent of its products in

25 California." (Opposition, p. 4:2-4.) Plaintiff then improperly extrapolates

26 that all such sales to wholesalers and retailers end up being consumed in

27 California. (*Id.*) Second, the supporting declaration of Richard McMahon

28 conservatively *overestimates* that "*less than 13%* of [Sunstar's] total

1 annual sales are to wholesalers and retailers in California.” (McMahon
 2 Decl., ¶ 15 (emphasis added).) Third, the volume of allegedly *misabeled*
 3 products consumed in California would be far less than 13%. Finally,
 4 Sunstar sells all of its products (100%) out of and through its operations in
 5 Illinois. (McMahon Decl., ¶¶ 5-9, 13, 15.)

- 6
- 7 ● Plaintiff’s argument and reference against severance (Opposition, p. 5:10-
 8 23) should not prevail, since plaintiff cannot satisfy the prerequisites under
 9 Rule 20. Among others errors, plaintiff argument (Opposition, pp. 5:25-
 10 6:5) makes a material mistake in that pleading the same *violation* against
 11 many defendants *does not mean* the same issues will be resolved as to
 12 each defendant. Once severed, the benefit or reason, if any at all, to
 13 maintain the action in the Northern District of California is further
 14 diminished and/or eliminated. And, plaintiff’s reliance upon the *IP Co. v.*
 15 *Oncor Electric Delivery* opinion is misplaced, since in *IP* the same patent
 16 was at issue, unlike in this case which involves different patents and
 17 completely different products.
- 18
- 19 ● Plaintiff’s argument that Sunstar has not established any significant
 20 difference in cost (Opposition, p. 4:6-9) is misleading in consideration of
 21 Sunstar’s McMahon Declaration. Sunstar’s declaration clearly establishes
 22 the heightened cost of litigating in the Northern District of California
 23 versus the Northern District of Illinois. Instead, plaintiff’s argument
 24 seems to be that there is *no specific dollar value* associated with the
 25 additional costs imposed upon Sunstar for litigating in the Northern
 26 District. However, Sunstar found no authority requiring an estimated
 27 monetary burden as part of moving for transfer. Notably, plaintiff’s
 28

1 opposition provides no specific dollar value within its own purported
2 burden of having to litigate in Illinois.

- 3
- 4 • Plaintiff's argument that defendants are mostly "large" entities and just
5 "absorb" the significant additional costs of litigation in the Northern
6 District for the convenience of plaintiff's counsel (Opposition, pp. 4:17-
7 5:9; 6:7-19) should be summarily disregarded as inequitable and
8 unprecedented. And, plaintiff's complaint that a transfer will impose
9 additional costs upon it should be disregarded as *plaintiff initiated this*
10 *lawsuit* against Sunstar and all the defendants in one case, whether proper
11 or not, *and was a conscious decision made by plaintiff to maximize its own*
12 *potential recovery with full knowledge of the potential risks and costs.*

- 13
- 14 • Plaintiff's argument that witnesses are located here in California
15 (Opposition, pp. 5:1-3; 6:7-9), should be disregarded. Plaintiff does not
16 state that each of the alleged 13 supporting witnesses are required to
17 testify against just Sunstar or would require their attendance at trial to
18 justify their travel to Illinois. Moreover, the alleged testimony is from any
19 such witness will be speculative, at best ("guestimates" of volume and
20 frequency), and have little, if any, probative value regarding the alleged
21 violations. Moreover, plaintiff will, no doubt, seek discovery regarding
22 volume and sales directly from defendants, thereby rendering the alleged
23 testimony from the 13 supposed witnesses objectionable and *obsolete*.
24 Similarly, plaintiff also does not explain the testimony D. Mount would
25 provide against just Sunstar to justify his travel to Illinois. With regard to
26 plaintiff's contention that a sample is located in California (Opposition, p.
27 7:2-14), plaintiff can have it transported with D. Mount or simply sent by
28 FedEx to local counsel.

- REPLY MEMORANDUM OF POINTS AND AUTHORITIES
BY DEFENDANT SUNSTAR AMERICAS, INC.

CERTIFICATE AND PROOF OF SERVICE

The undersigned certifies on the date identified below, the foregoing document(s) was filed with the Clerk of the U.S. District Court for the Northern District of California, using the court's electronic filing system (ECF), in compliance with Civil L.R. 5-4 and General Order 45. The ECF system serves a "Notice of Electronic Filing" to all parties and counsel who have appeared in this action and who have consented under Civil L.R. 5-5 and General Order 45 to accept that Notice as service of this document.

The undersigned also states that they: (1) are a citizen of the United States and employed in Los Angeles County, California; (2) are over the age of eighteen years and not a party to the within entitled action; (3) have a business address of 19191 S. Vermont Ave., Suite 420, Torrance, California, 90502; and (4) are readily familiar with the firm's practice for collection and processing of correspondence for mailing with the United States Postal Service.

On the date identified below, the undersigned placed with this firm at that above address for deposit with the United States Postal Service a true and correct copy of the within document(s):

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF JOINDER BY DEFENDANT SUNSTAR AMERICAS, INC. TO MOTIONS

in a sealed envelop, postage fully paid, addressed as follows:

Daniel R. Johnson
Ryan Kromholz & Manion, S.C.
3360 Gateway Road
Brookfield, WI 53045

Jason C. White
Howrey LLP
321 North Clark Street
Suite 3400
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Peter J. Armenio
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1 Ronald A. Clayton
2 Fitzpatrick, Cella, Harper & Scinto
3 1290 Avenue of the Americas
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4 Timothy J. Kelly
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6 1290 Avenue of the Americas
New York, NY 10104-3800

7 Following ordinary business practices, the envelop was sealed and placed for
8 collection and mailing on this date, and would, in the ordinary course of business, be deposited
9 with the United States Postal Service on this date.

10 Executed on June 24, 2010, at Torrance, California

11
12 /s/
13 Grant Nigolian